IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CUSTOMS APPEAL NO.33 OF 2005

M/s.Gujarat Alkalies &
Chemicals Limited, a
Company incorporated under
the Companies Act, 1956
and having its principal
place of business at P.O.
Petrochemicals - 391 349,
Dist, Vadodara (Gujarat) .. Appellant.

V/s.

The Commissioner of Customs
(Import), New Customs House,
Ballard Estate,
Mumbai - 400 001 .. Respondent.

Mr.N.S. Thacker with Mr.Madhur Baya for the appellant.

Mr.B.A. Desai, Additional Solicitor General with Mr.A.M. Sethna i/b. Mr.T.C. Kaushik for the respondent.

CORAM : DR.S. RADHAKRISHNAN &
J.P. DEVADHAR, JJ.

DATED : 1ST MARCH, 2006.

ORAL JUDGMENT (Per J.P. Devadhar, J.) :

1. Heard learned counsel on both sides.

2. Rule. Rule made returnable forthwith.

3. By consent of parties, the appeal is taken

up for final hearing.

4. The appellant (hereinafter referred to as 'the assessee') has filed this appeal under Section 130 of the Customs Act, 1962 to challenge the order passed by the Customs, Excise and Service Tax Appellate Tribunal, Mumbai ('CESTAT' for short) on 11th March, 2005.

5. The issue raised before the Tribunal was, whether, the show cause notice issued under Section 28 of the Customs Act, 1962 on 9th August, 2001 was time barred ? The Tribunal held that under Section 28 of the Customs Act, the relevant date of adjustment of duty after final assessment in the case of provisionally assessed goods is the date on which the amount paid provisionally is credited in to the government treasury as duty and not the date on which refund order or refund cheque was issued. Accordingly, the Tribunal held that in the present case, although the refund order was issued on 31st January, 2001 and refund cheque was issued on 6th February, 2001, for the purposes of Section 28 of the Customs Act, the adjustment of duty took place on 12th February, 2001 when the amount lying in the provisional duty account was credited into the government treasury and, therefore, the show cause

notice issued on 9th August, 2001 was within six months from 13th February, 2001 and hence valid.

6. The questions of law framed in the appeal have been modified by consent of the parties and the appeal is heard on the following reframed substantial questions of law :-

> "(a) Whether the expression 'relevant date' and 'date of adjustment of duty after the final assessment' in section 28(3)(b) of the Customs Act means:-
>
> (i) the date on which the refund cheque is issued: or
>
> (ii) the date on which the duty paid provisionally is actually credited into the government treasury;
>
> (b) Whether the Tribunal was justified in holding that after the final assessment of the Bills of Entry on 13.08.1999, even though the refund order was issued on 31.01.2001 and cheque No.894585 dated 06.02.2001 was issued to the Appellants, for the purposes of Section 28 of the Customs Act, the relevant date would be 12.02.2001 because the amount retained by the Customs after issuing the refund cheque was actually credited to the Government Treasury on 12/2/02 and hence the show cause notice dated 09.08.2001 is not time barred ?

7. Facts relevant for this appeal are that in the year 1994 the assessee wanted to set up a plant to manufacture Phosphoric Acid at Gujarat. With a view to import the capital goods required for the said plant, the assessee applied for registration of

its contract with the foreign supplier under the Project Import Regulation, 1986. The said contract was registered by the Customs authorities subject to the assessee depositing Rs.50,00,000/- (Rupees Fifty Lakh only) as cash security deposit. Accordingly, the assessee deposited the amount of Rs.50,00,000/- with the customs authorities.

8. Thereafter, the assessee imported several consignments of plant and machinery required for the setting up of the plant and all those consignments imported under the registered contract were cleared provisionally under heading 98.01 of the Customs Tariff Act, 1975 ('CTA' for short) with the concessional rate of duty in terms of Notification No.90/94 dated 1st March, 1994. It appears that in the month of April-May, 1995, the assessee had imported two consignments of amyl alcohol which were also cleared provisionally at the concessional rate under the registered contract. On the assessee submitting a reconciliation statement, all the goods cleared provisionally under the registered contract were finally assessed on 13th August, 1999. As per the said final assessment order, the assessee was liable to pay duty amounting to Rs.7,28,733/-.

9. As the duty paid provisionally was more than the duty assessed finally, the assessee became entitled to refund. Accordingly, refund order was issued on 31st January, 2001 specifically stating therein that out of Rs.50,00,000/- deposited by the assessee on 10th January, 1994 as cash security deposit for provisional assessment, the refund due to the assessee on final assessment is in the sum of Rs.42,71,267/- and the same has been sanctioned by the D.C. (contract cell) on 8th December, 2000. It was further stated that on presentation of the said order with the prescribed pre-receipt, the amount will be paid to the assessee. Accordingly, on presentation of the refund order with the pre-receipt, cheque for Rs.42,71,267/- was issued to the assessee by the Customs authorities on 6th February, 2001. As regards the amount of Rs.7,28,733/- retained by the Customs authorities towards the duty assessed finally, it appears that a challan was prepared on 9th February, 2001, but the said amount was actually credited to the Government treasury only on 12th February, 2001.

10. Subsequently, on 9th August, 2001 a show cause notice was issued to the assessee on the ground that the audit party has observed that the amyl

alcohol imported by the assessee was neither plant and machinery / components nor it was raw material required for the maintenance of the plant and machinery and, therefore, clearance of amyl alcohol at concessional rate under the notification No.90/94 dated 1st March, 1994 was erroneous. By the said show cause notice, the assessee was called upon to show cause as to why the less charged amount of Rs.66,11,698/- and the cash security deposit erroneously refunded should not be recovered from the assessee under Section 28 of the Customs Act, 1962.

11. The assessee in its reply contended that the show cause notice was barred by limitation. It was further submitted that the imported amyl alcohol has been in fact utilized for the initial setting up of the project as certified by the sponsoring authority and verified by the Customs authorities at the time of the registration of the contract and also at the time of assessment. Accordingly, the assessee requested that the show cause notice be withdrawn.

12. By an order-in-original dated 19th December, 2001, the Deputy Commissioner of Customs, after hearing the assessee, held that the show cause notice was not time-barred and that the amyl alcohol

imported and cleared by the assessee was not covered under the Project Import Regulations and consequently the benefit of exemption notification No.90/94 dated 1st March, 1994 was not available to the assessee in respect of the import of amyl alcohol. Accordingly, by the said order, the Deputy Commissioner of Customs confirmed the less charge demand quantified at Rs.74,93,298/- under Section 28(2) of the Customs Act, 1962 and further held that the assessee was liable to pay interest at the rate of 24% on the said amount under Section 28AA of the Customs Act, 1962.

13. On appeal filed by the assessee, the Commissioner of Customs (Appeals) by his order dated 15th November, 2002 held that once the refund order was issued on 31st January, 2001 and thereafter refund cheque was issued on 6th February, 2001 there was nothing further to be adjusted and, therefore, the limitation of six months for issuance of show cause notice on the ground of short levy under Section 28 of the Customs Act would commence from 7th February, 2001. As the show cause notice was issued on 9th August, 2001 which is beyond six months from 7th February, 2001, the Commissioner of Customs (A) held that the said show cause notice was time-barred and consequently, the order-in-original dated 19th

December, 2001 confirming the demand is neither legal nor proper. Thus, the Commissioner (A) without going into the merits of the case set aside the order-in-original dated 19th December, 2001 on the ground that the show cause notice was time-barred.

14. On further appeal filed by the revenue, the CESTAT by the impugned order dated 11th March, 2005 held that the relevant date of adjustment of duty for the purposes of computing the limitation period under Section 28 of the Customs Act would be the date on which the duty amount of Rs.7,28,733/- was actually credited to the Government Treasury. Since the duty amount of Rs.7,28,733/- lying in the provisional duty account was actually credited in to the Government Treasury on 12th February, 2001, the Tribunal held that the six months limitation for issuance of show cause notice under Section 28 of the Customs Act would commence from 13th February, 2001. Accordingly, the Tribunal held that the show cause notice issued on 9th August, 2001 being within six months from 13th February, 2001, the same was within time. Challenging the aforesaid order, the assessee has filed the present appeal under section 130 of the Customs Act.

15. To complete the narration of facts, it may be noted that in furtherance of the aforesaid order passed by CESTAT, the Customs authorities had issued a detention order on 10th June, 2005 to recover the demand confirmed by Order-in-Original dated 19/12/01. The assessee filed a writ petition bearing No.1885 of 2005 in this Court challenging the said detention notice. The said writ petition was allowed by an order dated 25th July, 2005 and while quashing the detention notice dated 10th June, 2005, this Court directed the Commissioner of Customs (Appeals) to dispose of the appeal filed by the assessee on merits expeditiously as the earlier order passed by the Commissioner (A) without going into the merits of the case was set aside by the CESTAT on 11th March, 2005.

16. When this appeal was taken up for admission on 26th October, 2005, it was contended by the revenue that in view of the order passed in Writ Petition No.1885 of 2005 on 25th July, 2005, the Commissioner (A) must be permitted to adjudicate the matter on merits and only thereafter, the present appeal should be taken up for hearing. It was pointed out to the counsel for the revenue that the proper course would be to hear the present appeal regarding the validity of the show cause notice dated

9th August, 2001 before the Commissioner (A) decides the appeal on merits. However, the revenue sought time to proceed with the hearing of the present appeal and at the same time insisted on proceeding with the hearing of the appeal on merits before the Commissioner (A). In these circumstances, the respondents were directed to file pursis to the effect that the Commissioner (Appeals) would hear the appeal on merits but will not pass a final order. Accordingly, hearing of the present appeal was adjourned at the request of the revenue after taking the above pursis on record.

17. Mr.Thakkar, learned counsel appearing on behalf of the assessee submitted that in the present case, the duty payable as per the final assessment order was Rs.7,28,733/- and after adjusting the said amount from the security deposit of Rs.50,00,000/- refund order was issued on 31st January, 2001 stating that the excess amount refundable was Rs.42,71,267/- and in fact refund cheque was actually issued to the assessee on 6th February, 2001. Accordingly, Mr. Thakkar submitted that 31st January, 2001 would be the relevant date of adjustment of duty and even if 6th February, 2001 is taken as the relevant date of adjustment of duty, the show cause notice issued on

9th August, 2001 would be time-barred as the same was issued beyond six months from 7th February, 2001.

18. Mr.Thakkar further submitted that the Tribunal was in error in holding that the relevant date of adjustment of duty under Section 28 of the Customs Act would be the date on which the amount lying in the provisional duty account is credited to the Government Treasury. He submitted that on a plain reading of Section 28(3)(b) read with Section 18(2)(a) of the Customs Act, it is abundantly clear that on refund of excess amount, the adjustment was complete and crediting the amount lying in the provisional duty account into the Government treasury was only a ministerial act. He submitted that after issuing the refund cheque on 6th February, 2001, the fact that the customs authorities took their own sweet time to prepare the challan on 8th February, 2001 and actually credited the duty amount from the provisional duty account into the Government treasury on 12th February, 2001 was wholly irrelevant for computing the period of limitation. Accordingly, Mr.Thakkar submitted that the limitation of six months commenced from 7th February, 2001 and, therefore, the show cause notice issued on 9th August, 2001 must be held to be time barred and all

actions taken pursuant there to are liable to be quashed and set aside.

19. Mr.Desai, learned Additional Solicitor General appearing on behalf of the respondents submitted that as per the order passed by this Court in Writ Petition No.1885 of 2005 on 25th July, 2005 the Commissioner of Customs (Appeals) must be permitted to dispose of the appeal filed by the assessee on merits and till then the hearing of the present appeal should be postponed. In the alternative, Mr.Desai submitted that the assessee may be permitted to raise the issue regarding the validity of the show cause notice before the Commissioner of Customs (Appeals), so that both the issues can be heard together.

20. With reference to the merits of the case, Mr.Desai submitted that for the cogent reasons given by the Tribunal in its order dated 11th March, 2005 the impugned show cause notice cannot be said to be time barred and therefore, the decision of the Tribunal should not be interfered with. He submitted that interpretation of Section 28(3)(b) of the Customs Act read "Eujesdem Generis" clearly show that under the Customs Act there are three clear cut

concepts Viz. assessment order, refund order and adjustment after assessment. This interpretation is also apposite in respect of interpretation of Section 27 Explanation (II). Significantly in both these sections same phrase "adjustment of duty after final assessment thereof" is used. If section 28(3) (b) is interpreted narrowly, then, section 27 Explanation (II) will have to be interpreted narrowly and this would be to the detriment to the general community of the assessees claiming refund.

21. Mr.Desai though in his written submissions contended that the legislature in its wisdom and has rightly treated the amount received on provisional assessment to be provisional duty and not an actual duty. The actual duty is adjusted only when the duty is actually paid by way of duty (tax) when it is appropriated to the Consolidation Fund of India and it is for this reason that Section 28(3)(b) clearly states that the relevant date of adjustment is the date when the amount of duty is credited to the Government Treasury i.e. Consolidated Fund of India. He further submitted that under section 28(3)(b), the relevant date of adjustment is neither the date on which the assessment order is passed nor the date on which the refund order is issued to the assessee but

it is the date on which the monies lying in provisional duty account is transferred to the Consolidated Fund of India as duty (tax). It was submitted that section 28 of the Customs Act is clear and specific and there is hardly any need for further interpretation.

22. Apart from the aforesaid written submissions, Mr.Desai gave his propositions of law in writing which reads thus:-

"a) Section 28 of the Customs Act deals with three kinds of arrears with regard to duty, including provisional, which could be non-levy, short-levy and erroneous refund. The said concepts are not mutually exclusive and they can get intermingled. The erroneous refund of 28(3)(c) refers to, for example, when the duty is levied by Adjudicating Officer by appellant order, it is (Sic)

b) Section 28(3)(b) deals with the provisional assessments of duty. The final assessment reducing the duty and subsequently, it is noticed that the provisional duty was erroneously refunded. Section 28(3)(b) unlike section 28 (3)(c) refers to a short-levy and erroneous refund in respect of provisional duty. The sections 28(3)(b) & 28(3)(c) are conceptually different but both refer to erroneous refunds.

c) The ‘provisional duty’ and ‘actual payment of duty’ are two different accounting heads having different financial status, ‘provisional duty’ is liable to be refunded at any time but the ‘actual payment of duty’ goes to the Government Treasury."

23. Relying upon the decisions of the Apex Court in the case of Geep Flashlight Industries Limited V/s. Union of India and Others reported in 1983 (13) E.L.T. 1596 (S.C.), The Indian Textile Paper Tube Co. Limited V/s. Collector of Customs reported in 1990 (48) E.L.T. 633 (S.C.) and Jacsons Thevara V/s. Collector of Customs and Central Excise reported in (1991) 2 Supreme Court Cases 62, Mr.Desai submitted that the order granting refund is not actual refund and for the purposes of section 28 of the Customs Act the relevant date is the date of actual refund. In the present case, though the refund cheque was issued on 6th February, 2001 admittedly, the said cheque was encashed on 14th February, 2001. Mr.Desai further submitted that in the present case, the concessional rate of duty was not available to the import of amyl alcohol and, therefore, the refund granted to the assessee was an erroneous refund. Since the erroneous refund was actually made on 14th February, 2001, he submitted that the limitation would commence from 15th February, 2001 and, therefore, the show cause notice issued on 9th August, 2001 must be held to be validly issued within six months from 15th February, 2001. Mr.Desai submitted that in any view of the matter, the show cause notice dated 9th August, 2001 cannot be said to have been issued

beyond six months from the relevant date. Accordingly, Mr.Desai submitted that the Tribunal was justified in holding that the show cause notice issued on 9th August, 2001 was not time-barred.

24. We have carefully considered the rival submissions as also the authorities cited before us.

25. Before dealing with the questions raised in the appeal, we may deal with the preliminary objection raised by the counsel for the revenue. It is contended that in view of the order passed in Writ Petition No.1885 of 2005, the present appeal should be heard only after the appeal pending before the Commissioner (A) is heard and disposed of on merits. There is no merit in this contention. The question of deciding the appeal on merits would arise only if the show cause notice dated 9th August, 2001 is held to be valid. Validity of the show cause notice dated 9th August, 2001 was neither raised nor decided by this Court while disposing of Writ Petition No.1885 of 2005. In that case, while quashing the detention notice issued by the respondents, this Court without going into the validity of the show cause notice had directed the Commissioner (A) to dispose of the appeal on merits expeditiously. Thus, in Writ

Petition No.1885 of 2005 this Court was not called upon and in fact, this Court has not dealt with the issue regarding the validity of the show cause notice. Therefore, the proper course is to hear the present appeal regarding the validity of the show cause notice first before hearing the appeal on merits. The Commissioner (A) cannot once again decide the issue as to whether the show cause notice was time-barred or not, because, the Tribunal has already decided that issue and the very same issue is the subject matter of the present appeal. Accordingly, we reject the preliminary objection raised by the revenue.

26. We may now set out the provisions of the Customs Act that are relevant for deciding the questions raised in this appeal.

> "18. Provisional assessment of duty
>
> (1) ....
>
> (2) When the duty leviable on such goods is assessed finally in accordance with the provisions of this Act, then-
>
> (a) in the case of goods cleared for home consumption or exportation, the amount paid shall be adjusted against the duty finally assessed and if the amount so paid falls short of, or is in excess of, [the duty finally assessed], the importer or the exporter of the goods shall pay the deficiency or

be entitled to a refund, as the case may be;

(b) in the case of warehoused goods, the proper officer may, where the duty finally assessed is in excess of the duty provisionally assessed, require the importer to execute a bond, binding himself in a sum equal to twice the amount of the excess duty.

28. Notice for payment of duties, interest, etc - (1) When any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer may-

a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, within one year;

b) in any other case, within six months,

from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has short-levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice ;

Provided that.....

(2) .....

(2A) ....

(2B) ....

(2C) ....

3. For the purposes of sub-section (1), the expression "relevant date" means-

a) in case where duty is not levied, or interest is not charged, the date on which the proper officer makes an

order for the clearance of the goods;

b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof;

c) in a case where duty or interest has been erroneously refunded, date of refund;

d) in any other case, the date of payment of duty or interest.

27. Thus, Section 18 of the Customs Act deals with the clearance of goods on provisional assessment and the steps to be taken after the final assessment. Section 28 of the Customs Act empowers the proper officer to issue notice for payment of duties, interest, etc. in case of non levy or short levy or erroneous refund within the time stipulated therein. It is not in dispute that the limitation applicable for issuing notice, in the present case is six months from the 'relevant date of adjustment of duty'.

28. The question that falls for consideration in this appeal is, in the case of provisionally assessed goods what is the relevant date of adjustment of duty on finalisation of the provisional assessment? Is it the date on which the excess amount is granted / refunded to the assessee or is it the date on which the amount lying in the provisional duty account is

transferred to the government treasury ? Section 18 of the Customs Act provides complete answer to this question. It provides that in certain cases the proper officer may permit clearance of the goods on payment of duty as provisionally assessed and it further provides for the complete mechanism to be followed on finalisation of the provisional assessment. They are (a) in the case of goods cleared for home consumption, the amount paid provisionally shall be adjusted against the duty finally assessed, (b) after such adjustment, the amount that falls short of, or is in excess of the duty finally assessed be determined (c) if the amount paid provisionally falls short of the duty assessed finally, then call upon the importer to pay the deficiency and if the amount paid provisionally is in excess of the duty finally assessed then grant refund to the importer. Thus, as per Section 18(2)(a) of the Customs Act, it is only after the duty assessed finally is adjusted from the duty paid provisionally, the excess or shortfall is determined and only on such adjustment the obligation to make good the deficiency or entitlement for refund arises.

29. In the present case the duty paid provisionally was Rs.50,00,000/- and the duty finally

assessed was Rs.7,28,733/-. By refund order dated 31st January, 2001, the proper officer has sanctioned refund for Rs.42,71,267/-. Thus, it is apparent that, it is only after the adjustment of the duty assessed finally from the duty paid provisionally, the excess amount refundable to the assessee has been determined and communicated to the assessee by refund order dated 31st January, 2001. Therefore, 31st January, 2001 would be the relevant date of adjustment of duty under Section 28 of the Customs Act.

30. Alternatively, assuming that Mr.Desai is right in his submission that it is not the date of computing the refund but the date of implementing such refund is the relevant date of adjustment of duty for computing limitation of six months, then, in the present case, the refund order was given effect to by issuing a refund cheque on 6th February, 2001. As per law laid down by the Apex Court, once the cheque is encashed it relates back to the date on which the cheque was issued. (see Commissioner of Income Tax, Bombay South, Bombay V/s. Messrs Ogale Glass Works Ltd., Ogale Wadi reported in A.I.R. 1954 S.C. 429 and in the case of K. Saraswathy alias K. Kalpana (dead) by Lrs. V/s. P.S.S. Somasundaram

Chettiar reported in (1989) 2 S.C.J. 615). Accordingly, in the facts of the present case even if 6th February, 2001 i.e. the date on which the refund cheque was issued is held to be the relevant date of adjustment of duty, the show cause notice dated 9th August, 2001 would be time-barred as the same was issued beyond six months from 7th February, 2001.

31. The findings given by the Tribunal that the relevant date of adjustment of duty would be the date on which the amount lying in the provisional duty account was transferred to the Government Treasury, in our opinion, runs counter to the express words used in Section 18(2)(a) of the Customs Act. If the legislature intended that in the case of provisionally assessed goods, the relevant date for issuing show cause notice under Section 28 should be the date on which the amount lying in the provisional duty account is actually credited in to the government treasury, then, it would have specifically stated so in Section 28(3)(b). It may be noted that under section 28(3)(c), in case of erroneous refund, the relevant date specified is the ‘date of refund’. Similarly, in cases covered under section 28(3)(d) the relevant date is the ‘date of payment of duty’. Therefore, when the legislature has consciously and

distinctly used the word ‘adjustment of duty’, ‘date of refund’ and ‘date of payment’ to be the relevant dates in respect of the cases covered under Section 28(3)(b), 28(3)(c) and 28(3)(d) respectively, it will not be proper to hold that the words ‘relevant date of adjustment of duty in section 28(3)(b) to mean the date on which the amount lying in the provisional duty account is credited to the government treasury.

32. As rightly contended by the learned counsel for the assessee, the excess amount refundable to the assessee can be determined only when the duty payable on finalisation of the provisional assessment is adjusted from the duty paid provisionally. It may be noted that issuing the refund cheque and crediting the duty amount equivalent to the duty finally assessed into the government treasury are the two steps to be taken after the adjustment of duty. On adjustment of duty, it is open to the proper officer to credit the duty amount into the government treasury and also issue refund cheque to the assessee simultaneously, or, he may first credit the duty and then issue the refund cheque or he may first issue the refund cheque and thereafter credit the duty into the government treasury. Therefore, crediting the amount into the government treasury as duty and

issuing refund cheque are the steps to be taken after the adjustment of duty. Thus, in our opinion, in cases where the duty assessed finally is less than the duty paid provisionally, then the date on which the proper officer determines and issues the refund order would be the relevant date of adjustment of duty for the purpose of issuing a show cause notice under Section 28 of the Customs Act.

33. Even if the revenue is right in its contention that the adjustment of duty takes place only on giving effect to the refund order, even then the relevant date of adjustment of duty would be the date on which the refund cheque is issued or the date on which the amount is credited into the government treasury whichever is earlier. To put it simply, in cases, where the proper officer in implementation of the refund order issues the refund cheque first and then credits the duty amount into the government treasury, then, the relevant date of adjustment of duty would be the date on which the refund cheque is issued. Similarly, if the amount of duty is credited into the government treasury first and thereafter the refund cheque is issued, then, the relevant date of adjustment of duty would be the date on which the duty amount is credited into the government treasury.

In the present case, the refund cheque was issued on 6th February, 2001 and thereafter the duty amount was credited into the government treasury and, therefore, 6th February, 2001 would be relevant date of adjustment of duty.

34. Strong reliance was placed by the counsel for the revenue on the decisions of the Apex Court in the case Geep Flaslight Industries (supra) and in the case of Indian Textile Tube Paper Co. Ltd. (supra). In those cases, the Apex Court was considering the limitation prescribed in case of erroneous refund and not the cases covered under Section 28(3)(b) of the Customs Act. In other words, in those cases the Apex Court has considered the meaning of the word ‘date of refund’ and the Apex Court was not called upon to construe the meaning of the word ‘adjustment of duty’. Therefore, the ratio laid down by the Apex Court in the aforesaid cases has no relevance to the facts of the present case. Similarly, the ratio laid down by the Apex Court in the case of Jacsons Thevara (supra) has no relevance to the facts of the present case.

35. The contention of the revenue that the show cause notice is for recovery of the erroneous refund

cannot be accepted. In the present case, the refund was issued after giving effect to the final assessment order. By the said refund order, the excess amount refundable on adjustment of the duty finally assessed has been quantified. There is no fault in determining the quantum of refund. Therefore, the amount refunded to the assessee cannot be said to be an erroneous refund. Till the show cause notice issued to the assessee culminates in setting aside or modifying the final assessment order, it cannot be said that the refund granted is erroneous. As stated earlier the date of payment is the date of delivery of the cheque. Therefore, though the refund cheque dated 6th February, 2001 was encashed on 14th February, 2001, it will have to be held that the excess amount as per the refund order was paid to the assessee by delivery of cheque on 6th February, 2001. Accordingly, in the facts of the present case, we hold that the 'relevant date of adjustment of duty' is 31st January, 2001 that is the date on which the refund order was issued to the assessee. Assuming that the revenue is right in its contention that the adjustment of duty takes place only on implementation of the refund order, then also, in the present case, the excess amount as per the refund order, was paid to the assessee by

delivery of cheque on 6th February, 2001 and, therefore, 6th February, 2001 would be the relevant date of adjustment of duty. In this view of the matter, the show cause notice issued on 9th August, 2001 becomes time-barred as the same has been issued beyond six months from 7th February, 2001.

36. In the result, the appeal succeeds. The reframed questions are answered accordingly.

37. As we have held that the show cause notice dated 9th August, 2001 was time-barred, all actions taken pursuant to the said show cause notice are rendered invalid and unenforceable.

38. The appeal is disposed of in the above terms with no order as to costs.

(DR.S. RADHAKRISHNAN, J.)

(J.P. DEVADHAR, J.)